Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-923

OLINKRAFT, INC.,

Petitioner

versus

MARY EVELYN CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MARY EVELYN CLARK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Olinkraft, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on August 4, 1977.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals in this case is reported at 556 F.2d 1219, 15 FEP 374 (5th Cir. 1977), and is set forth at Appendix "A" hereto.

The order of the Fifth Circuit Court of Appeals denying rehearing and rehearing *en banc* is unreported and is set forth at Appendix "C" hereto.

The judgment by the United States District Court for the

Western District of Louisiana dismissing respondent's complaint is unreported and is set forth at Appendix "E" hereto. All Appendices are bound separately and filed together with this petition.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1) pursuant to the August 4, 1977, opinion of the Fifth Circuit Court of Appeals reversing and remanding the December 8, 1975, dismissal of respondent's complaint by the United States District Court for the Western District of Louisiana upon which judgment was entered on December 15, 1975, and pursuant to the November 7, 1977, denial of petitioner's petition for rehearing and rehearing *en banc* by the Fifth Circuit Court of Appeals.

QUESTION FOR REVIEW

Is a Charge of sex-based promotion discrimination, filed with the Equal Employment Opportunity Commission more than one hundred eighty days after any denial of promotion and more than one hundred eighty days after discontinuance of a prior, allegedly discriminatory promotion system, timely under § 706(e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(e) and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 52 L.Ed. 2d 571 (1977)[1] because present adverse effects of promotion denials under the prior system "toll" the statutory limitations period and establish a "continuing violation"?

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1. The decision of the Supreme Court in this case will be hereinafter referred to as the *Evans* decision.

STATUTORY PROVISIONS INVOLVED

Section 706(e) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e- 5(e) reads in pertinent part as follows:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter. . . .

Rule 12(b) and 56 of the Federal Rules of Civil Procedure are set out in their entirety at Appendix "F" hereto.

STATEMENT OF THE CASE

Although somewhat obfuscated by the gyrations of the Appeals Court's majority in reaching reversal in this case, the proceedings and facts underlying this action are simple and uncontroverted. Only in their misapplication in conflict with *Evans* is complexity encountered.

Respondent Clark (plaintiff below) is a female employee of Olinkraft, Inc. (defendant below). She was hired on March 12, 1964. On March 5, 1975, she filed a charge with the Equal Employment Opportunity Commission alleging that petitioner had unlawfully discriminated against her be-

cause of her sex by denying her promotions.[2] After investigation, the EEOC issued a July 23, 1975, determination that no reasonable cause existed to believe Title VII had been violated in regard to respondent's promotions. (App. G, pp. A-27-28.) This action was filed on October 15, 1975. The complaint (App. "G") alleges that in the spring of 1964 and continuing for an unspecified period of time thereafter that petitioner had a "policy or practice" of promoting males with less seniority over qualified females to better paying jobs and that petitioner continues to maintain such a policy or practice. Respondent further alleged that between her initial employment on March 12, 1964, and her promotion to roll tender on October 1, 1974,[3] less senior males were promoted ahead of her and that petitioner "continues" to engage in such activity.

Petitioner filed a motion to dismiss the complaint on November 7, 1975, with attachments which established certain facts upon which dismissal was urged. (App. "H".) This

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2. This charge is found at Appendix "H", pp. A-33-36. The appendix also contains a copy of the promotional progression established by the then current labor agreement in plaintiff's department. (App. "H", p. A-52). Under this system of progression, plaintiff was eligible to be promoted in sequence from feeder-grabber to roll handler to press operator helper to press operator. That appendix also shows that tenure within each of these job classifications leads to automatic hourly pay increases commonly referred to as "step increases." This is significant because it is actually this pay system concerning which Ms. Clark complains when she alleges that less senior male employees received greater promotional and pay benefits than did she.

3. The actual date of this promotion is established by the company's records as being September 8, 1974. (App. "H", p. A-45.) Respondent admits on deposition that the records would most accurately reveal the true date. (App. "J", p. A-108.) The exact date is not material, however, in the context of the issues of this case.

motion was founded on Rule 12(b), Federal Rules of Civil Procedure, and, at paragraph 4, tracked the language of Rule 12(b)(6) and urged judgment on the basis that the complaint failed to "state a claim upon which relief can be granted.... because all allegations....are based on facts and events which occurred more than one hundred eighty days prior to March 5, 1975, which was the date of the filing of her charge of employment discrimination...." Petitioner filed its answer and attachments on November 10, 1975 (App. "I"), and on December 2, 1975, the sworn deposition of respondent was taken. (App. "J".) The deposition was filed into the record on December 4, 1975.

Oral argument was held on petitioner's motion on December 8, 1975. The trial court sustained petitioner's motion and its December 15, 1975, judgment was tantamount to a grant of summary judgment.[4]

There is no material fact in dispute in this case. Respondent as a deponent was unable to specify any time, place, event or set of circumstances within one hundred eighty days showing she had been denied a promotional opportunity. Respondent submitted no response setting forth any specific fact in contravention of the material facts upon which petitioner relied. Those material facts are as follows:

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4. Argument was confined to the summary judgment issue after respondent's concession that the claims asserted under 42 U.S.C. §1981, 42 U.S.C. § 1983 and the Fifth and Fourteenth Amendments to the S. Constitution were not within the subject matter jurisdiction of the court as a matter of law. This resolved the Rule 12(b) (1) portions of petitioner's motion and left only the 12(b) (6) portion of said motion for contention. All extraneous facts in the record were before the court this day and the proceedings thereafter, regardless of labels, were conducted under Rule 56, Federal Rules of Civil Procedure.

1. Petitioner hired respondent on March 12, 1964.

2. On August 12, 1974, the company instituted a remedial seniority system which gave an "affected class" of females hired prior to July 2, 1965, the right to compete for promotions based on their total company seniority. (This system is referred to as the female "AC" Agreement and appears at appendix "I", pp. A-64-A-72.)

3. Respondent was a member of the affected class of employees under this agreement.

4. Respondent worked as a feeder-grabber until September 8, 1974,[5] when she was promoted to roll tender by operation of the "AC" Agreement.

5. Respondent was promoted to press operator helper on October 7, 1974 by operation of the "AC" Agreement.

6. Respondent was promoted to press operator on August 9, 1975, by operation of the "AC" Agreement.

7. After the August 12, 1974, "AC" Agreement, respondent was never denied a *promotion* to a job to which she was entitled.[6]

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5. This date is established by the company records and respondent clearly stated on deposition that she did not know the exact date of her promotion and the company records would be the best evidence of the exact date. (App. "J", p. A-108, p. A-140.)

6. The Fifth Circuit's reversal in part relies on its creation of a "disputed issue of fact" by its reading of "the allegations of the complaint and the deposition." (App. "A", p. A-10, f.n.9.) This finding was volunteered regardless of the understanding of all parties at all prior stages of this litigation that the issue was whether petitioner was entitled to judgment as a matter of law. Unfortunately, this obvious afterthought by the court below requires confrontation in this petition for certiorari. Said holding relies on incorrect interpretations of law as will be shown by petitioner's argument at a subsequent section of this petition.

8. Respondent's complaint is premised entirely on the contention that she should have received earlier promotions and been making more money and was precluded from doing so by the promotion system in effect prior to August 12, 1974. She has no quarrel with the female "AC" Agreement or its operation in regard to her promotions.

The trial court decided without opinion that in the absence of specific facts showing the existence of a system of discrimination or the occurrence of an act of discrimination within the statutory period, dismissal was proper. Respondent entered an appeal to the United States Court of Appeals for the Fifth Circuit.

A three judge panel of the Fifth Circuit Court of Appeals, Judge Coleman dissenting, reversed and remanded the trial court's judgment in an August 4, 1977, decision. Petitioner timely filed a request for rehearing and request for rehearing *en banc* which was denied by the court's November 7, 1977, order. (App. "C".) A motion for stay of mandate was granted to petitioner on November 11, 1977, and mandate was stayed until December 22, 1977, by order of the Court of Appeals. (App. "D".) This petition for writ of certiorari follows.

In the majority opinion, the Circuit Court declared that "(t)his appeal raises the increasingly litigated question, what constitutes a continuing violation of the Act for purposes of tolling the running of the one hundred and eighty day period." In resolution of this question, the court held that plaintiff's "allegations...are sufficient to toll the running of the one hundred eighty day period; here discrimination in

promotion and pay continues" and that "(t)he allegations of the complaint and testimony in the deposition show that continuing discrimination is under attack" and "appellant's action is not time barred."

Despite the above language, and despite drawing precedential value from the now overruled *en banc* decision of the Seventh Circuit Court of Appeals in *Evans v. United Air Lines*[7] as "recent support" for an "expansion" of the "seriously disputed" theory of "continuing violations," the majority opinion culminated by stating that it need not reach the question decided by the Supreme Court in *Evans* because there existed a "critical disputed factual question" rendering summary judgment inappropriate. Thus, although neither party contradicted by specific factual material any evidence nor urged any factual dispute in brief or argument, the majority opinion *sua sponte*, avoided the doctrine of *Evans*[8] by its creation of a factual issue. In so doing, the court blatantly expanded the continuing violation theory, despite *Evans*, and reopened a Pandora's box of uncertainties in relation to the application of the limitations period established at 42 U.S.C. § 2000e-5(e). Unless overturned by the Supreme Court, the decision below reestablishes the validity of raising a challenge to a presently neutral employment system for use as a conduit to reach events or systems of alleged discrimination which ceased to exist more than one hundred eighty days before the EEOC charge was filed. Thus, the question supposedly interred by *Evans* is exhumed.

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7. 534 F.2d 1247 (7th Cir. 1976).

8. Issued after oral argument before the panel but before rendition of the Fifth Circuit's August 4, 1977, decision.

REASONS FOR GRANT OF THE WRIT

The decision of the majority of the panel in this case raises compelling reasons which require the grant of the writ requested.

First, the decision of the Court of Appeals directly conflicts with the holding of *Evans* in that it bares for attack acts which occurred and systems which existed only in excess of one hundred eighty (180) days prior to the filing of a "Charge of Discrimination" with the EEOC. *Evans* plainly insulates such a past act or prior system from attack as "an unfortunate event in history which has no present legal consequences."

Second, as observed by the majority of the panel in this case, the issue on the timeliness of charges under § 706(e) of the Act is a recurring and "increasingly litigated" one involving an important question of statutory interpretation. The decision of the majority of the panel in this case exposes to attack virtually all collectively bargained for seniority systems which historically may have disadvantaged a minority group even where the system has been abolished and a remedial system has been adopted in its place. The legacy of the Circuit Court's opinion will be continued and protracted litigation of pre-*Evans* issues of timeliness and corresponding delay in the resolution of Title VII claims in direct contravention of the national goals favoring the speedy resolution of Title VII claims and elimination of employment discrimination.

Third, the decision of the majority of the panel in this case conflicts with decisions of the Courts of Appeals in *De Graffenreid v. General Motors*, 558 F.2d 480 (8th Cir. 1977);

and *Cates v. Trans World Airlines*, 561 F.2d 1064, (2nd Cir. 1977).

Fourth, the decision of the majority of the panel in this case is contrary to the decisions of the panels of the Court of Appeals for the Fifth Circuit in *McMonigle v. Delta Airlines, Inc.*, 556 F.2d 1261 (5th Cir. 1977) and *Cutliff v. Greyhound Lines, Incorporated*, 558 F.2d 803, 805 f.n. 5 (5th Cir. 1977).

Fifth, the decision of the majority of the panel misapplies Rule 56, FRCP, in that it allows avoidance of summary judgment in Title VII claims by allowing charging parties to rest upon allegations rather than requiring them to produce specific facts showing a genuine issue for trial.

ARGUMENT

1. The decision of the Fifth Circuit Court of Appeals directly conflicts with the rule enunciated by the U.S. Supreme Court in *United Air Lines v. Evans.*

The Court of Appeals did not apply the timeliness principle mandated in *United Air Lines v. Evans*, supra, in its decision in this case. The contention of the plaintiff in *Evans* is virtually identical to the complaint of respondent herein. The Court stated in *Evans* that although "(r)espondent recognizes that it is now too late to obtain relief based on an unlawful employment practice which occurred in 1968....(s)he contends...that United is guilty of a present continuing violation of Title VII and therefore her claim is timely." The Court below purported to decide the question of "what constitutes a 'continuing violation' of the Act for

purposes of 'tolling' the running of the one hundred eighty day period."

In *Evans*, as in the case at hand, the facts established that the system causing the original prejudice to plaintiff had ceased to exist more than one hundred eighty days prior to the filing of her charge. In *Evans*, as in the case at hand, no definable adverse act of employment discrimination was shown by plaintiff to have occurred within one hundred eighty days of the date of plaintiff's EEOC charge. In *Evans*, as in the case at hand, the plaintiff's presentation of her opposition to summary judgment relies solely on her emphasis of "the fact that she alleged a *continuing violation.*"

Unless its own statement of the issue is ignored, the Court of Appeals decided the issue of the case at hand contrary to the dictates of *Evans*. The opinion below is initiated by the Court's unqualified statement that "(t)his appeal raises the increasingly litigated question of what constitutes a 'continuing violation' of the Act for purposes of 'tolling' the running of the one hundred eighty day period." In deciding this question the Circuit Court relied on the finding in *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 348 (10th Cir. 1975), that a failure to promote "invariably arises during a lengthy period of time" and when alleged, is sufficient to toll the running of the one hundred eighty day period.[9] The Supreme Court decision in the *Evans* case addressed the question of "continuing violations" in the following context:

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9. *Evans* involved a failure to promote issue in that denial of plaintiff's back seniority disadvantaged her in matters of wages, vacations, layoffs and recalls and flight selection. All these matters are vestiges of higher rank in the airline industry. The greater wages respondent herein seeks signal an accruement of higher rank in the normal industrial situation and she claims entitlement thereto only by virtue of the petitioner's

> (Plaintiff) contends...that United is guilty of a present continuing violation of Title VII and therefore that her claim is timely. She advances two reasons for holding that United's seniority system illegally discriminates against her: first, she is treated less favorably than males who were hired after her termination in 1968 and prior to her reemployment in 1972; second, the seniority system gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination. Neither argument persuades us that United is presently violating the statute. (footnote omitted.) 52 L.Ed. 2d 571, 577-578.

In *Evans*, the continuing violation theory was resolved by the Supreme Court as follows:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within 90

(Footnote 9 - continued)

alleged failure to promote her under the pre-August 12, 1974, promotion system. As almost any employee in this country's work force knows, a promotion occurs upon the event or act of raising an employee to a higher position or rank. A denial of promotion occurs upon the employer's refusal to so elevate an employee and is signaled by either the elevation of another employee or the elevation of none to a job vacancy. Said rejection is an easily identifiable act. The point is that in both *Evans* and the case *sub judice* there is no identifiable act, event or system of disadvantages existing within one hundred eighty days of the charge; all disadvantages are present "effects" of past acts of alleged discrimination.

> days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Respondent emphasizes the fact that she alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and finge benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists. She

> has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation. (Footnote omitted). 52 L.Ed. 2d 571,578.

The teaching of *Evans* is as follows: In order to timely reach an alleged occurrence of discrimination under 42 U.S.C. § 2000e-5(e), an EEOC charge must be filed *within one hundred eighty days of a specific event of disadvantage* in the complainant's employment history (i.e., discharge, rejection for hire, rejection of promotion, etc.) *or within one hundred eighty days of the existence of a system of discrimination* (i.e., a nonvalidated testing requirement for hire or promotion, a rule requiring discharge of each garnished em-

ployee, etc.).

The application of this principle to the instant case is not a difficult one. The system of promotions which allegedly restricted the promotion of respondent ceased to exist on August 12, 1974. Thereafter, respondent's promotional advancement was controlled by a system which was not merely neutral on its face, but which gave respondent new and enhanced promotional opportunities. In *Teamsters v. U.S.*, 431 U.S. 324, 52 L.Ed. 2d 396 (1977), at footnote 30, the Supreme Court observed that "Evans holds that the operation of a seniority system is not unlawful under Title VII even though it perpetuates post-Act discrimination that has not been subject to a timely charge by the discriminatee." There is no question but what the charge at hand fails to mount a timely attack on petitioner's pre-August 12, 1974, seniority system regardless of the allegation of a "continuing violation." Neither does the charge reach any definable act, event or occurrence of promotional disadvantage incurred by respondent. Every act or occurrence shown to have taken place in regard to respondent within one hundred eighty days of her charge was an act of promotion. Respondent submitted no specific factual showing that she was rejected for or denied a promotion within the one hundred eighty days preceding her March 5, 1975, EEOC charge. Neither the complaint, nor any argument of respondent at any stage of this proceeding, nor the evidence submitted by petitioner (including respondent's deposition), nor the opinion of the Court below specifies any event or occurrence of rejection for promotion to which respondent was subjected within the relevant time period.

The decision of the Fifth Circuit Court of Appeals is in-

capable of a reading other than that it resolves "the increasingly litigated question, what constitutes a 'continuing violation' of the Act for purposes of 'tolling' the running of the one hundred eighty day period" by reliance on "recent support" for the "seriously disputed" doctrine "of expanding the continuing violation theory to continuing effects of past discrimination...." This "expansion" was made with total disregard to the Supreme Court's resolution of the identical issue in *Evans*.

The callous disregard of *Evans* in the decision below obviates the plain Congressional intent to preclude pursuit of stale claims under the Act. That the breadth of this obviation is alarming is starkly illustrated by the situation of the respondent in this case. Ms. Clark, under the operation of the August 12, 1974, promotion system of petitioner was promoted to press operator, the highest job to which she is entitled or. August 9, 1975. She reached the highest contractual step pay rate on October 19, 1977. Under the decision below's "expansion" of the "continuing violation" theory, were she to file a charge alleging a "continuing violation" on the date of the filing of this petition and a subsequent complaint predicated thereon, she would be held to have mounted a timely attack on petitioner's pre-August 12, 1974, promotion practices.[10] The Supreme Court addressed itself to this untenable proposition in *Evans* as follows:

> The statute does not foreclose attacks on the current operation of seniority systems which are

10. A timely attack on the old promotion system could also be mounted by any other female employee of petitioner or any other similarly situated employees until one hundred eighty days past such time as the new neutral or remedial promotion system resulted in their elevation to the top job and top pay scale in their plant.

> subject to challenge as discriminatory. But such a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of §703 (h). 52 L.Ed. 2d 571, 579-580.

In the case at hand, respondent seeks not past seniority credit, which she has already received, but only past pay credit. Her own words on this issue are explicit. (App. "J", pp. A-152-A-154, p. A-156.) The gravamen of her claim is that if she had been promoted based on company seniority during the period from March 12, 1964, and August 12, 1974, she would on the date of her charge have been making more money and occupying a higher job classification. On March 5, 1975, these disadvantages were clearly mere *effects* of petitioner's prior promotion system and pre-August 12, 1974, denials of promotion which, having not been timely attacked by a charge, are of no legal consequence under *Evans*. On this basis, this petition should be granted and the decision below be overturned. Otherwise the plain words of the Act and the precise holding and policy of *Evans* are thwarted.

2. The decision of the Court of Appeals directly conflicts with the post-*Evans* decisions of the Second and Eighth Circuit Courts of Appeal and with post-*Evans* decisions of other panels of the Fifth Circuit.

In *De Graffenreid v. General Motors*, 558 F.2d 480 (8th Cir. 1977) the Eighth Circuit Court of Appeals was presented the first opportunity to apply the Supreme Court's *Evans* decision. The Court characterized the holding in *Evans* as follows:

> Evans establishes that post-Act discrimination affecting an employee's seniority status which is not made the subject of a timely charge with the EEOC must be treated the same as pre-Act discrimination, and thus an otherwise neutral seniority system cannot be attacked merely because it perpetuates the effect of such discrimination. 558 F.2d 480, 484.

Applying the holding of *Evans* to the facts of its case, the Court concluded as follows:

> In Evans, the discrimination was effectuated through forced resignation. Here, in contrast, the complaint focuses upon GM's alleged general pattern or practice of excluding black women from employment, which deterred these appellants from earlier seeking and obtaining employment with GM. Although we do not know precisely when GM's allegedly unlawful employment practices first affected these appellants, we can be sure that any unlawful failure to hire appellants ended on their respective dates of hire. As in Evans, the employer's seniority system is neutral in operation. Thus, when appellants failed to file charges with the EEOC within one hundred eighty days following their entry into service, GM was entitled to consider its earlier failure to hire appellants as lawful, a mere "unfortunate event in

> history which has no present legal consequenses [,]" *United Air Lines, Inc. v. Evans*, supra,__U.S. at ___, 45 LW at 4567, 14 FEP Cases at 1512, and measure appellants' seniority from their actual dates of hire. 558 F.2d 480, 485.

In *Cates v. Trans World Airlines*, 561 F. 2d 1064, (2nd Cir. 1977), the Second Circuit Court of Appeals held that present adverse effects resulting from earlier discrimination which was not made the subject of a timely charge were insulated from attack under *Evans*. The Court decided as follows:

> Under Evans, this does not charge a present violation of Title VII. Nor does the fact that present disadvantages arising from past discrimination crystallized in layoffs for Cates and George trigger a new period within which charges may be filed, as the district court believed. Cates and George stand in the same position as Whitehead, and, since the neutral seniority system here was insulated from attack by § 703(h), can only point to the initial refusal to hire as a violation of Title VII. Because such a claim was not asserted in timely fashion by any of the appellants, as held by the court below, see supra at 7, it has no present legal significance. We therefore affirm the dismissal of appellants' Title VII allegations. 561 F. 2d 1064, 1072.

In both of the above cases, the underlying charges were made by employees who were feeling the adverse "effect" of unemployment by virtue of alleged acts or systems of discrimination in layoffs which occurred more than one hundred eighty days prior to their charges. The acts and systems which their current disadvantages were predicated upon, as in the case at hand, no longer existed.

Similarly, here the plaintiff may have been subjected to earlier promotion discrimination under a discriminatory promotion system. The system no longer exists and the one which has replaced it is facially neutral and not itself under attack. To be sure, until she reached the top pay rate in the top job in her line of progression on October 19, 1977, respondent felt the effects of the prior discriminatory system in her pay check. But, the critical fact is that Ms. Clark had not been denied a promotion nor been subjected to a discriminatory promotion system within one hundred eighty days of her March 5, 1975 charge.[11] Accordingly, as in *Cates*, *De Graffenreid* and *Evans* itself the prior alleged discrimination against respondent may be treated by petitioner as a mere "unfortunate event in history which has no present legal consequences." 52 L.Ed. 2d 571, 578. The failure of the Fifth Circuit to so treat it places the decision *sub judice* in direct conflict with those of the Second and Eighth Circuits and is additional reason for grant of certiorari in this case.

Further, two subsequent decisions of different panels of the Fifth Circuit reach different results than that reached by the majority of the panel on the critical issues of the case at

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11. Contrary to the implications of *Rich v. Martin Marietta Corp.*, supra, to the extent relied upon by the majority in the case at hand in support of its "tolling" doctrine, the equities of expanding the statutory limitations period as defined in *Evans* would more rightfully flow to the victim of discharge or layoff -- characterized in the law of arbitration as "industrial capital punishment" -- than to an employee such as respondent here whose current deprivation is totally confined to small economic losses.

hand. In *McMonigle v. Delta Airlines, Inc.*, 556 F.2d 1261 (5th Cir. 1977) the Court held that a charge filed by a previously unlawfully discharged employee for employer's failure to rehire her was untimely when neither the act of discharge nor the rule requiring discharge was shown to have existed within one hundred eighty days of the charge. That panel found *Evans* controlling and approved the trial court's dismissal. And to create further uncertainty, yet a different panel of the Fifth Circuit Court of Appeals has decided that a failure to promote is not a "continuing violation" of 42 U.S.C. § 1981 so as to "toll" the running of the applicable statute of limitations under that statute. In *Cutliff v. Greyhound Lines, Inc.*, 558 F.2d 803, 805, f.n. 5 (5th Cir. 1977), the Court unequivocally stated as follows:

> We reject as baseless Shaw's contention that the claimed discrimination was a "continuing violation". The effect of the violation continued, but clearly the violation itself, if it occurred, was on or before the date of the award of the position to Daniel, August 15, 1972.

This total lack of uniformity in dealing with these crucial issues leaves the same uncertainty surrounding the one hundred eighty day question within the jurisdiction of this very Circuit as existed prior to the *Evans* decision.[12] This is a further compelling reason for grant of the writ of certiorari.

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12. To further confuse actual and potential Title VII litigants, on July 18, 1977, the EEOC responded to the *Evans* decision by announcing its interpretation of that decision relative to the "continuing violations" doctrine. An "interpretive" memorandum of that date provides as follows:

3. The case was appropriate for summary judgment as there is no genuine issue of material fact for trial.

Until appearance of the last paragraph of the majority opinion below, this case was treated by the parties and the courts as one in which no genuine factual issue was present and in which the question was whether judgment for petitioner was appropriate as a matter of law. In candor, the addition of this section of the opinion is only capable of fair characterization as an afterthought inserted by the majority to avoid the *Evans* doctrine which, as is apparent from the remainder of the opinion, and the dissent thereto, would otherwise mandate an opposite result. Although cognizant that this codicil to the opinion below adds a difficult dimension to this petition, petitioner respectfully submits that however adroit, this judicial manipulation is ill founded in law and is erroneous on the undisputed facts of this case.

Footnote 12 (continued)

> The Commission interprets *United Airlines vs Evans* to hold only that discharges are not continuing violations. If a claim for unlawful discharge is not filed within 180 days of termination, the charge is not timely.
>
> The Commission does not consider that the case affects the continuing violation principle with respect to other employment practices. In particular, any allegation of discriminatory denial of transfer or promotion will be deemed continuing *if the practice or policy accounting for the denial remains in effect within 180 days of the charge.* The Commission will assume jurisdiction over such allegations. When evidence of continuing denial of advancement arises in the investigation of other issues, the matter of discriminatory denial of advancement will be addressed. (emphasis added) 95 LRR 234 (July 18, 1977)

Clearly the respondent's charge raises no timely attack on petitioner's pre-August 12, 1974 system under the above standards.

Such contrivance favors rather than diminishes the importance of the reasons for grant of this writ. Absent reversal of the decision below, the pre-*Evans* issues involving the one hundred eighty day issue have experienced a phoenix-like rebirth.

Summary judgment is a device for piercing the pleadings and allowing judgment without trial where there is no factual issue for trial and movant is entitled to judgment as a matter of law. The summary judgment procedure is often uniquely appropriate for deciding issues involving the statute of limitations.[13] The procedure is initiated by a movant's factual showing that there is no genuine issue of fact to be decided upon trial. If no special factual dispute is raised by the opponent's response thereto, the remaining issue is whether movant is entitled to judgment as a matter of law. In 1963, Rule 56, Federal Rules of Civil Procedure, was amended at section (e) to require that a party opposing summary judgment "not rest upon the mere allegations or denials of his pleadings, but ... set forth specific facts showing there is a genuine issue for trial." This addition to the rules specifically abrogated the right of a movant's opponent to rely on allegations contained in pleadings and memoranda to create the requisite issue of material fact for denial of the motion. Clearly, insofar as the holding of the Circuit Court below is predicated on its statement that "the allegations of the complaint...show that continuing discrimination is under attack", it is clearly erroneous as a matter of law. (App. "A", p. A-10, f.n.9.) "The...doctrine which permits the pleadings

13. Its use under other employment discrimination statutes for disposition of this issue is recognized. See *Gruca v. United States Steel Corp.*, 495 F.2d 1252 (3rd Cir. 1974); 6 Moore's Federal Practice §56.17(58) at 1059 (2nd ed 1975).

themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule." 6 Moore's Federal Practice, § 56.01[14] at 56-22 (2d ed. 1975). Cf. *Robin Construction Company v. U.S.*, 345 F.2d 610, 614 (3rd Cir. 1965).

The court below not only relied on the pleadings but also on certain "allegations" purportedly made by respondent in her deposition in finding a disputed issue of fact. This finding was made without regard that petitioner and respondent, both in brief and oral argument, acknowledged that the posture of the proceedings required the deposed testimony of respondent be accepted as true. The "critical disputed factual question" found by the court below was based on its finding that respondent "repeatedly stated that even after the effective date of the agreement, men with less company seniority than her seniority were promoted ahead of her." (App. "A", p. A-9.) It should be emphasized here that neither the Court below nor respondent at this critical stage of the proceeding relies on an argument or finding that petitioner's post-August 12, 1974, promotion system is other than neutral and nondiscriminatory. In any event, the new system is a matter of undisputed fact in this case and if it is an unlawful one, that determination is a matter of law, not fact. To defeat summary judgment in this context, then, respondent was obligated to show a genuine issue of fact in regard to an act or event of promotional adversity which befell her within one hundred eighty days of her charge. Respondent's obligation in this regard is to show specific facts contravening the otherwise undisputed fact that she had been promoted to every job for which she was eligible and qualified since the advent of the August 12, 1974, "AC" Agree-

ment.[14] A careful reading of respondent's deposition is necessary for a determination of whether an issue of genuine fact is actually raised thereby. But the difficulty or ambiguity attendant to this reading does not warrant rejection of summary judgment.[15]

The question raised by whatever confusion exists in respondent's deposition is one of law, not of fact. That question is whether the deposition shows respondent was, at any time within one hundred eighty days of her charge, rejected

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14. The Supreme Court has clearly held that to make an initial showing of discrimination under Title VII, a complainant must show "(i) that he belongs to a . . .minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As the Supreme Court stated at footnote 44 of its decision in *Teamsters v. U.S.*, supra, the purpose of the general criteria set out in *McDonnell Douglas* is to "demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." Absent such a showing, a Title VII defendant is entitled to summary judgment. There is no dispute as to what respondent said in her deposition; for summary judgment it must be taken as true. Thus, the issue actually resolved by the Court of Appeals was, as its own opinion clearly states, the legal issue of what quantum of facts constitutes a continuing violation of the Act for purposes of tolling the running of the one hundred eighty day period.

15. Where the ambiguity of a writing raises a difficult question, but one which must be resolved from the writing alone, the question raised is not one of fact but of law. *Ammons v. Franklin Life Insurance Company*, 348 F.2d 414 (5th Cir. 1965.)

for a promotion for which she was qualified and eligible.[16] If respondent's deposition established that she was rejected for an entitled promotion within one hundred eighty days of her charge, said charge was timely as a matter of law. If there is any dispute concerning a material fact in this case, it is a product only of slightly inconsistent statements made by respondent on deposition. Self-contradition by an opponent of summary judgment as a means of raising an issue of material fact is skeptically viewed by the courts, however, because it "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Perma Research and Development Company v. Singer Company*, 410 F.2d 572, 578 (2nd Cir. 1969).

It is true that on deposition respondent had understandable difficulty recalling the dates of her promotions and these were ultimately established to be best substantiated by her company personnel records. (App. "J", p. A-108.) It is further true that she occasionally indicated that certain male employees were "put up before her." (App. "J", pp. A-83, A-84, A-109, A-111, A-150, A-154-155.) But petitioner does not deny the truth of these statements. In fairness to respondent, she was tenacious, not untruthful, on deposition. But, it was established by petitioner in respondent's deposition that on September 16 and 17 of 1974, two males less senior than respondent were promoted from press operator helper to press operator (App. "J", pp. A-141-143.) It is a matter of undisputed fact that on those dates, respondent occupied the job of roll tender and was eligible only for promotions to press operator helper under the facially neutral line of pro-

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16. In operation of "line of progression" promotion systems such as utilized by petitioner, application is not a necessary pre-requisite to promotion as senior employees are entitled to automatic advancement to the next higher job upon a vacancy in that job.

gression promotion system. (App. "H", p. A-52). It was also repeatedly admitted by respondent on deposition that she was not only *not eligible* for promotion to press operator on September 16 or 17 of 1974, but that she was *not qualified* for this job at that time. (App. "J", pp. A-83-84, A-115-116, A-142-144, A-151, A-154-155.) Further, and more significantly, respondent repeatedly testified that the August 12, 1974, promotion system had resulted in no prejudice to her promotions but had only resulted in her advancement.[17]

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17. These portions of the deposition are as follows:

Q. Now, after you went on Roll Stand, but before you went to Helper, you said several times, that no man was promoted to Operator, I mean to Helper ahead of you, during that period of time, is that correct?

A. Not that I know of. (App. "J", p. A-112.)

Q. But since the time that you were trained and qualified, has any man been promoted ahead of you who had less Company seniority?

A. Right now, you talking about?

Q. I am talking about since you were qualified to run the Press. Since you had been trained in the Roll Tender and the Helper classification?

A. Has anybody went ahead of me?

Q. Yes, ma'am.

A. No. (App. "J", pp. A-115-116.)

Q. And since that incident, whenever it was, no man with less Company seniority than you has been promoted to any job ahead of you, is that correct?

A. That is right.

Q. And since, whenever your payrecords reflect that you were promoted to Roll Tender, you have been promoted ahead of everybody, male and female in that department, have you not?

A. That I have more Company seniority than, yes.

Q. You are charge - you do not charge in this lawsuit that the Company has violated that Agreement that is attached to your affidavit as Exhibit "2", do you?

A. What are you talking about?

Q. I am talking about the A C Agreement?

A. No, I did not say that, why?

Q. O.K. I was just asking you.

The burden carried by petitioner on summary judgment was to establish there was no material issue of fact requiring trial. The record shows the installation by petitioner of the August 12, 1974, promotion system which is at least neutral as to respondent. It shows she was thereunder promoted three times. It shows by her admission that she has not been denied a promotion to a job for which she was qualified. Respondent's burden was then to produce specific facts showing an issue for trial.[18] This she did not do. Summary judgment was then either appropriate or inappropriate as a matter of law under *Evans*, because there was only a legal issue left for resolution and the trial judge, in light of the intervening decision in *Evans*, decided it correctly. The Appellate Court did not, choosing at once to ignore and circumvent *Evans*. For that reason, grant of writ of certiorari is appropriate.

A. Yes.

Q. You are satisfied that the Company has abided by that Agreement as far as you are concerned, since it has been in affect, is that correct?

A. I suppose so. (App. "J", pp. A-116-117.)

Q. O.K., and you say that we continue to promote, or Olinkraft continues to promote to better paying jobs men who have less seniority than you or, you know, as a female. Now, has that happened to you since the first of September of 1974?

A. That somebody has been promoted around me, you mean?

Q. Yes ma'am.

A. No, they have not.

Q. To a job--since 1974, at least, you have been promoted by Company seniority and you have been promoted ahead of everybody, male and female, is that not correct?

A. Since the first job, yes. Since I got to the Roll Stand, I have been promoted like I should. (App. "J", pp. A-153-154.)

18. Allegations of confusion or inconsistency in the movant's testimony are not enough. *Lundeen v. Cordner*, 356 F.2d 169 (8th Cir. 1966.)

CONCLUSION

Because the decision of the Fifth Circuit Court of Appeals contravenes an opinion of the U.S. Supreme Court and conflicts with its own opinion as well as those of other U.S. Circuit Courts of Appeal, and because of the national importance of the issues raised, it is respectfully urged that this writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been this day forwarded to respondent's counsel of record, Joe D. Guerriero, by mailing him a copy, postage prepaid, to P.O. Box 4092, Monroe, Louisiana, 71201.

New Orleans, Louisiana, this 21st day of December, 1977.

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